

ANTITRUST JURISPRUDENCE: A SYMPOSIUM ON THE ECONOMIC, POLITICAL AND SOCIAL GOALS OF ANTITRUST POLICY

INTRODUCTION

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Felix S. Cohen has observed that

[a]n ethics, like a metaphysics, is no more certain and no less dangerous because it is unconsciously held. There are few judges, psychoanalysts, or economists today who do not begin a consideration of their typical problems with some formula designed to cause all moral ideals to disappear and to produce an issue purified for the procedure of positive empirical science. But the ideals have generally retired to hats from which later wonders will magically arise.¹

If the wonders of antitrust policy are the metaphysical constructs of rules stating what the law *is* and the ethical constructs of the reasoning stating what it *ought* to be, the hats whence they arise often remain obscure. The ideological values dictating the scope and direction of antitrust analysis are hidden behind rubrics of “per se” illegality,² the refinements of elegant tests for market analysis,³ and the vagaries of “standing”⁴ or “causation”⁵ re-

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¹ F. COHEN, *ETHICAL SYSTEMS AND LEGAL IDEALS* 3 (1959).

² See *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967); *United States v. Topco Assocs.*, 405 U.S. 596 (1962); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

³ See *United States v. Marine Bancorporation*, 418 U.S. 602 (1974); *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974).

⁴ See *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972); Sherman, *Antitrust Standing From Loeb to Malamud*, 51 N.Y.U. L. REV. 374 (1976).

⁵ See *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 97 S. Ct. 690 (1977).

quirements limiting the right of private plaintiffs to recovery. The recent limitations imposed by the Burger Court upon antitrust enforcement in some areas⁶ and the Court's expansive reading of the scope of the antitrust laws in others⁷ are manifestations of a deeper and more complex process than the discovery of new insights into the workings of old rules or a preference for one mode of economic analysis over another. The underlying ideological presuppositions of a majority of the Court have changed, and recent decisions reflect change in these deep-seated assumptions about the "is" and the "ought" of antitrust policy and the Court's role in implementing that policy. The manner in which these assumptions generate legal decisions depends on those factors that precondition one's perceptions of reality, interpretations of the meaning of legal concepts, trust in the ability of language to carry the burden of articulating knowable and acceptable rules, and faith in the legal process to express long term goals yet maintain flexibility. To probe this ideological substratum affecting decisionmaking is the task not only of the judge who would know himself, but also of the practitioner who would understand the meaning and relevance of existing doctrine, and of the scholar who would contribute to the evolution of the law.

When the ideological complexion of lawmaking institutions like the Supreme Court shifts over a relatively short time-span, a re-examination of the ideals of antitrust policy is necessary to understand the evolution of doctrine through the litigation process. The heretofore predictable, even if fuzzy-about-the-edges, doctrines of antitrust policy and the evolving direction of antitrust principle become unsettled and difficult to predict. Such a state of affairs is of concern to the practicing lawyer since certainty and predictability, to the extent they do exist in the world of antitrust, become even more obscure in a system of changing values, different emphasis, and refined verbalizations all hiding new ideological shifts.

The current change in direction by the Court is paralleled by increasing ideological debate among the scholars of antitrust policy. Traditionally, scholars trained in the art of legal analysis

⁶ See cases cited notes 3-5 *supra*.

⁷ *Cantor v. Detroit Edison Co.*, 96 S. Ct. 3110 (1976); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975); *Connell Const. Co. v. Plumbers Local 100*, 421 U.S. 616, (1975).

debated what antitrust policy is or ought to be within relatively narrow boundaries. They parsed the inductive and deductive logic of legal decisions, oblivious to sources of wisdom beyond the four corners of what judges said in written opinions. The insights of legal realism disturbed this tidy world of clipped analysis and gentlemanly dispute, heavily laden with footnotes. At its simplest level, legal realism suggested that one should be aware of the ideological complexion of decisionmakers and perhaps try to discover from what "side of the bed" they happened to arise on decision day. Yet, initially, admonitions that the "pre-perceptive mass" of the decisionmaker be taken into account, like forays into the empirical world, did not stray too far from the path of defining and articulating a knowable body of rules in force and tendencies in gestation. In time, however, legal realism undermined the belief that law and legal decision-making could be carried out pursuant to the positivist's closed model of deductive logic by which application of abstract rule to concrete facts inexorably produced the "correct" decision. If carried to an extreme, however, the approach of the legal realists also undermined the stability of doctrine and, in areas like antitrust, made rational predictability of lawful business structure, acquisitions, or behavior hazardous at best or, at worst, dependent upon short-circuiting the enforcement process before litigation began. Perhaps in response to the open-ended and uncertain evolution of antitrust policy during the era of the Warren Court, there has been a renewed effort to bring greater certainty and predictability to antitrust analysis by the rigorous employment of the seemingly objective and value free tool of statistical analysis of quantifiable empirical evidence pursuant to models designed to maximize "economic efficiency."

The quest for certainty has not been limited to courts staffed by judges more sympathetic to the need for predictability, narrower in their view of the function of courts, and trusting in the ability of verbal rules to dictate outcome. Indeed, the ideological shifts in the courts have followed the escalation of debate and dissension among the scholars of antitrust.⁸ In recent

⁸ An early highlight of the growing dispute over the goals of antitrust policy was the series of exchanges between Professors Blake and Jones of Columbia and Professors Bork and Bowman of Yale. *The Goals of Antitrust: A Dialogue on Policy*, 65 COLUM. L. REV. 363, 377, 401, 417, 422 (1965). See generally Austin, *The Emergence of Societal Antitrust*, 47 N.Y.U. L. REV. 903 (1972); Bernhard, *Competition In Law and Economics*, 12 ANTITRUST BULL. 1099 (1967); Brodley, *Massive Industrial Size, Classical Economics and The*

years the intensity of the scholarly debate has dramatically increased as proponents of "economic analysis" of legal issues have brought to bear the potentially powerful insights of their methodology to "issues antitrust." Perhaps also in response to the uncertainties created by legal realism, some have even gone so far as to contend that the empirical evidence of the world objectively quantifiable and measured against a value-free economic model of "efficiency" should be the sole test for defining antitrust policy, thereby freeing us at last from the heretofore frustrating vagaries of antitrust enforcement policy, judicial decisionmaking and legislative policy-making. All that is needed is a collective bending at the knee by bench and bar before the "science" of economics, and a recognition that once and for all we have an objective tool that can lead us to truth, certainty and an ideal world consistent with the hopes and aspirations of all. With this development we come full circle. The realists discarded the view of law as a seamless web and replaced it with an inquiry into the psychology and ideology of the decisionmaker that was sure to breed levels of uncertainty. Yet by rejecting the positivist model the realists also exposed law to non-legal sources of authority, and it is one of those sources, economics and its "objective" pursuit of efficiency, that is now proposed as a guide to bring order out of chaos. To the extent that one believes this ought to be so to the exclusion of other sources of knowledge, and that it can be so given the frailties of the legal process, the proponents of an exclusive reliance upon economic analyses to resolve disputes in the legal process are reborn positivists. The dictates of the inexorable and immutable truth of "economic efficiency" when rigorously applied to quantified empirical evidence can bring order out of chaos, harmonize policy with "reality" and end wasteful regulation. The "right" decision is assured through application of the model of efficiency to any given facts.

This position is not without its critics, not only because the writings of some of its proponents often tend to be unintelligible theoretical model building, but because there are those who be-

Search for Humanistic Value, 24 STAN. L. REV. 1155 (1972); Dewey, *The Economic Theory of Antitrust: Science or Religion?*, 50 VA. L. REV. 413 (1964); Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451 (1974). There have also been recent congressional hearings on the topic. *The Role of Small Business In Our Society Before the Senate Select Comm. on Small Business*, 94th Cong., 1st Sess. (1975); *Symposium on the Economic, Social and Political Effects of Economic Concentration Before the Subcomm. on Antitrust & Monopoly of the Senate Judiciary Comm.*, 92d Cong., 2d Sess. (1972).

lieve that economics is not a science, or at least not an objective verifier of a knowable reality resulting in eternal truth.⁹ Many view economic analysis as a useful tool, one of several sources of insight to be relied upon in framing policy, to be weighed along with other sources of knowledge, value choices and intuition.¹⁰ Even those who may be willing to argue that economic analysis of "efficiency" is itself value free may still claim that antitrust policy is designed to achieve political and social goals as well and that those goals should outweigh, in some cases, any claimed or proven economic inefficiencies.¹¹ Some believe this is so because Congress intended the antitrust laws to serve goals broader than the maximization of economic efficiency however defined or applied. Others may suggest that economic efficiency is unwisely proffered as the sole objective of antitrust because the psychological assumptions about human nature upon which the *laissez faire* model of economic analysis is constructed may be misleading or incomplete. They only take account of the selfish and Spencerian aspects of human nature rationally applied and fail to consider or encourage the equally significant factors of human motivation that may stem from irrational behavior, a lust for power, or a praiseworthy sense of fraternity or altruism.¹² A further objection to sole reliance upon economic efficiency as a guide to policy, even if agreement could be had upon its definition and application, is that law is a human institution designed to fulfill human aspirations as well as to curb human excesses. Even if efficiency is expansively defined to encompass a maximization of social welfare in addition to a maximization of value of

⁹ See Leff, *supra* note 8. Daniel Yankelovitch indicates how a thinking process that places exclusive reliance on quantifiable data may blind one to "reality." Policy makers measured success in the Viet Nam War by equating success with numbers of pacified villages, "body counts," and tons of bombs dropped, a process Yankelovitch labeled the "MacNamara Fallacy."

The first step is to measure whatever can be easily measured. This is okay as far as it goes. The second step is to disregard that which can't be measured or give it an arbitrary quantitative value. This is artificial or misleading. The third step is to presume that what can't be measured easily really isn't very important. This is blindness. The fourth step is to say that what can't be easily measured really doesn't exist. This is suicide.

Smith, *The Last Day of Cowboy Capitalism*, THE ATLANTIC MONTHLY, Sept. 1972, at 43, 54 (quoting Daniel Yankelovitch).

¹⁰ See Blake & Jones, *The Goals of Antitrust: A Dialogue on Policy*, 65 COLUM. L. REV. 363, 377, 422.

¹¹ See Bernhard, *supra* note 8.

¹² See Brodley, *supra* note 8. For a current popular statement of this view, see SCHUMACHER, *SMALL IS BEAUTIFUL: ECONOMICS AS IF PEOPLE MATTERED* (1973).

output, other equity concerns, such as curbing the arbitrary exercise of power will continue to elude the economics-obsessed jurist. Many of the deep divisions among the scholars of antitrust policy stem from divergent presuppositions, seldom unveiled for critical examination, about these assumptions and ideals that have been "generally retired to hats from which later wonders will magically arise."

The significance of the debate far exceeds intellectual titillation for the inhabitants of the academy. The outcome of cases frequently depends upon an attorney's facility in structuring the evidence to prove or disprove "economic efficiency" within the limitations of the verbal formulas of antitrust rules and the assumptions, conscious and otherwise, of judge and jury about the economic, political, and social goals of antitrust policy. Evidence of motive or intent may not be admissible in the court of a judge convinced that the antitrust test for the legality of human conduct in the economic arena must be objectively weighed on the scales of maximization of the value of total output.

On the other hand, in the courtroom of a judge preoccupied with equity and insensitive to long-term economic efficiency, evidence of "evil purpose" may so overwhelm a judge or jury that drastic remedies are employed in circumstances where none is justified. A decision in a particular case tainted by evil intent may create a precedent that is counter to the long-term public goals of the antitrust laws.

At the appellate level, the ideological meaning of "economic efficiency" and the balance to be struck between efficiency, however defined, and other goals of antitrust, however defined, underlie many of the pressing issues in antitrust. For example, the willingness of the Supreme Court to condemn as horizontal territorial restraints the practices involved in *United States v. Topco Associates*¹³ expressly rested upon the majority's preception of broad political and social goals of antitrust:

Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every

¹³ 405 U.S. 596 (1962).

business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion and ingenuity whatever economic muscle it can muster.¹⁴

Beneath the metaphors one senses what Learned Hand described as a preference for “a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few.”¹⁵ So long as courts countenance such non-economic goals, prediction of results in the world of antitrust will be an art rather than a science, dependent upon a sophisticated understanding of the limits, as well as the capacity, of formal economic analysis, and the balance to be struck with other sources of wisdom perhaps not subject to quantification. As in constitutional adjudication, the Court is charged with giving effect to the long term value choices underlying the vague and general language of the law, all the while respecting the effective limits of the judicial process and balancing the need for a generous flexibility to accommodate new circumstances and certainty to resolve present and pressing problems.

The implications of the unexamined assumptions of decisionmakers in antitrust matters extend beyond influencing the conscious balancing of economic goals and political or social goals. The perception of the facts relied upon to prove or disprove an antitrust violation may differ greatly depending upon the metaphysical and ethical assumptions one brings to bear on the dispute. For example, the majority and dissenting opinions in the deeply divided Ninth Circuit decision of *GTE Sylvania, Inc. v. Continental T.V., Inc.*¹⁶ reflect startlingly different perceptions of what “in fact” transpired in the court below. The majority interpreted the trial court’s jury instructions as stating that vertically imposed location clauses are *per se* unlawful.¹⁷ The dissenting judges, apparently reading the same instructions, interpreted them as informing the jury that a contract, combination, or conspiracy with one or more dealers to enforce a location clause agreement and resulting in a restraint on resale of the goods is *per se* unlawful.¹⁸ The differing interpretations of what tran-

¹⁴ *Id.* at 610.

¹⁵ *United States v. Aluminum Co. of America*, 148 F.2d 416, 427 (2d Cir. 1945).

¹⁶ 537 F.2d 980 (9th Cir.), *cert. granted*, 97 S. Ct. 252 (1976).

¹⁷ *Id.* at 988.

¹⁸ *Id.* at 1006 (Kilkenny, J., dissenting); *Id.* at 1018 (Browning, J., dissenting).

spired at trial or, perhaps more accurately, the inclinations to perceive what transpired at trial one way or the other, were deeply influenced by the majority and dissenting judges' ideological presumptions about the goals of antitrust policy. In *GTE Sylvania*, the ideals were retrieved from Felix Cohen's "hats," and sparked long opinions debating the "is" and the "ought" of antitrust policy. In the process, the debate not only served to demonstrate how such underlying ideological assumptions influence the choice of policy, but how ideological assumptions may even dictate one's preception of the "reality" which gave rise to the dispute.

The realist tradition suggests at least that the vague mandate of the antitrust laws, leaving the court so much freedom to chart directions and articulate rules, will engage many sources of insight and will pursue a multiplicity of value choices. Certainty will prevail where there is a consensus on the value choices expressed (horizontal price fixing); uncertainty will prevail where there are conflicts between the values perceived and the wisdom of the choices made (vertical market restraints). To consider these directions, these sources, and these choices and clarify the values involved, the Antitrust Law and Economics Section of the American Association of Law Schools devoted its 1976 annual meeting to a panel discussion of the topic: "The Social and Political Goals of Antitrust—Other than Competitive Markets and Economic Efficiency, What Else Counts?" The panel was composed of distinguished scholars of antitrust, experienced in the practice and teaching of antitrust policy from a variety of perspectives. Professor Kenneth Elzinga of the University of Virginia presented the view of an economist with a deep and long-standing interest in antitrust enforcement; he has served as Economic Advisor to the Assistant Attorney General in charge of the Antitrust Division.¹⁹ Professor Lawrence Sullivan contributed the views of a law professor with many years of experience in practice as a partner in a leading Boston law firm and involvement in cases of current significance.²⁰ Professor Gray Dorsey presented a philosopher's perspective on the question that is

¹⁹ Professor Elzinga has written extensively on antitrust remedies and recently co-authored a book on the subject. ELZINGA & BREIT, *THE ANTITRUST PENALTIES: A STUDY IN LAW AND ECONOMICS* (1976).

²⁰ Professor Sullivan is co-counsel for the plaintiff in *GTE Sylvania, Inc. v. Continental T.V., Inc.*, 537 F.2d 980 (9th Cir.), cert. granted, 97 S. Ct. 252 (1976). He is also the author of *Handbook of the Law of Antitrust* (1977).

seasoned with experience teaching antitrust and service as counsel in significant antitrust litigation.²¹

In addition to the formal papers presented by the panelists that are printed here, lively commentary was provided by Professor Joseph Brodley of Indiana University and Professor Michael Levine of the University of Southern California. The authors of the formal papers were delegated the tasks of bringing to bear their expertise as economist, philosopher, and law professor and their considerable practical antitrust experience to the propositions: (1) whether the goals of antitrust policy include social and political values as well as economic ones; (2) if so, what are those goals; (3) how can the political and social goals identified be harmonized with economic efficiency; and (4) how can one translate the resulting brew into workable and predictable legal standards. The insights provided by all the participants provoked a lively discussion and a broader understanding of the ideological underpinnings of antitrust policy. Whether one has a fixed belief that economic analysis according to accepted models for measuring economic efficiency is only the beginning of antitrust analysis, the beginning and the end of it, or only a relevant consideration along with political, social, and other values, it is well for the reader to keep in mind one of Felix Cohen's other trenchant observations:

Lawyers . . . have special opportunities to learn what many logicians have not yet recognized: that truth on earth is a matter of degree, and that, whatever may be the case in Heaven, a terrestrial major league batting average above .300 is nothing to be sneezed at.²²

²¹ Professor Dorsey represented the plaintiff in *Albrecht v. Herald Co.*, 390 U.S. 145 (1968) and the plaintiff in *Hiland Dairy v. Kroger Co.*, 402 F.2d 968 (8th Cir. 1968), *cert. denied*, 395 U.S. 961 (1969). Professor Dorsey also serves as President of the International Association for Philosophy of Law and Social Philosophy. He is editor of the Association's three volume work, *Toward Equality and Freedom: An International and Comparative Approach*, to be published this year.

²² Cohen, *Field Theory and Judicial Logic*, 59 YALE L.J. 238, 239 (1950).